

90-486

No. _____

Supreme Court, U.S.

FILED

SEP 17 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LOWELL SAYLOR, et al

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE
STATE OF OREGON WATER RESOURCES
DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF OREGON

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QUESTION PRESENTED FOR REVIEW

Where plaintiffs bring an action in state court under 42 U.S.C. § 1983 for a violation of Fifth and Fourteenth Amendment rights, where the § 1983 federal claim is substantial, and the state court finds the § 1983 federal claim "unnecessary" because parallel relief is available under state law, are plaintiffs "prevailing parties" entitled to attorney fees under 42 U.S.C. § 1988?

PARTIES

Petitioners are Lowell Saylor, Oregon Trail Ranches, Inc., and Alfalfa Acres, Inc.

Respondents are the State of Oregon, Oregon Department of Water Resources, and Michael F. Ladd, Watermaster, District 5, of the State of Oregon Water Resources Department.

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STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE
STATE OF OREGON WATER RESOURCES
DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF OREGON

Petitioners respectfully pray that a
writ of certiorari issue to review the
decision of the Oregon Court of Appeals

entered March 14, 1990. This decision was denied review by the Supreme Court of the State of Oregon on June 19, 1990.

OPINIONS BELOW

The Oregon Supreme Court's denial of review is reported at 310 Or. 122 (1990). The decision of the Oregon Court of Appeals is reported at 100 Or. App. 745, 788 P.2d 494 (1990).

JURISDICTION

In accordance with 28 U.S.C. § 1257(a), this petition prays for certiorari review of a judgment by the highest court of a State in which the decision could be had. The Oregon Court of Appeals issued its decision below on March 14, 1990. The Oregon Supreme Court denied review on June 19, 1990. This petition is therefore timely pursuant to the provisions of Rule 13.1 of the Rules

of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

Article VI of the United States Constitution provides, in pertinent part as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

United States Constitution, Article VI, Paragraph 2.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1983 of Title 42 of the United States Code provides, in pertinent part as follows:

Every person who, under color of any statute . . . of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Section 1988 of Title 42 of the United States Code provides, in pertinent part:

In any action or proceeding to enforce a provision of [Section] * * * 1983 * * * of this title,

the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

42 U.S.C. § 1988.

STATEMENT OF THE CASE

This is an action for violation of plaintiffs' substantive right to the enjoyment and use of irrigation water, a property right vested in plaintiffs under the terms of a 1916 Water Rights Decree. On February 11, 1988, plaintiffs called upon the state to deliver irrigation water to their lands in accordance with the decree; the state refused. App. 23.

Plaintiffs subsequently filed this action in the state trial court in April, 1988, alleging a civil rights claim under 42 U.S.C. § 1983, and asking for

declaratory and injunctive relief. After conducting a hearing, the trial court ruled in favor of the plaintiffs and ordered the state to deliver water to plaintiffs in May-June, 1988 to make up for the water the state had denied to them in February. App. 25.

Having prevailed on the merits, plaintiffs moved for and were awarded attorney fees under 42 U.S.C. § 1988. App. 15-17. The trial court's analysis in granting plaintiffs' motion for attorney fees contains the following summary of relevant facts:

In this action plaintiffs were already injured by the action of the Watermaster. They were told under paragraph 7 of the distribution plan that their accumulated water rights would not be recognized until they signed the plan. This restriction was imposed after the starting date for plaintiffs' accumulated water

rights and drought conditions exacerbated the situation. Thus, plaintiffs were in fact denied their accumulated water rights from January 19, 1988 until March 21, 1988."

App. 16-17.

The state appealed the trial court judgment to the Oregon Court of Appeals, contending that the trial court had erroneously awarded attorney fees because plaintiffs federal claims were not substantial.^[1]

The Oregon Court of Appeals reversed. Citing and relying on Oregon State Police Officers Ass'n v. State of

[1] For purposes of this inquiry, a federal claim is "substantial" unless it is "obviously frivolous" or "absolutely devoid of merit" or clearly foreclosed by prior controlling authority. E.g. *Hagans v. Lavine*, 415 U.S. 528, 536-38, 39 L.Ed.2d 577, 587-88, 94 S.Ct. 1372, 1379 (1974). Plaintiffs' federal claims were sufficiently substantial to prevail in the trial court.

Oregon, 308 Or. 531, 783 P.2d 7, (1989),
petition for cert. filed, April 11, 1990,
the Oregon Court of Appeals held that
because plaintiffs were entitled to the
injunctive relief they sought under state
law, their invocation of 42 U.S.C. § 1983
was "unnecessary"; consequently, the
trial court's award of attorneys fees was
reversed. App. 9-10. Plaintiffs
petitioned for review in the Oregon
Supreme Court. That tribunal denied
review on June 19, 1990. App. 4.

REASONS FOR GRANTING PETITION

I. This case should be consolidated
and reviewed together with another
pending case which presents the same
question.

The issue presented in this petition
is identical to the question raised in

another case that is before this Court, Oregon State Police Ass'n v. State of Oregon, 308 Or. 531, 783 P.2d 7 (1989), petition for cert. filed, April 11, 1990. Indeed, the decision of the court below was based solely on a perfunctory citation to the Oregon State Police Ass'n case.

Because of the identity of the issues in the two cases, it is respectfully submitted that the immediate case should be consolidated and reviewed on certiorari together with the Oregon State Police Ass'n case.

II. The Oregon Court of Appeals has misconstrued 42 U.S.C. § 1983 and § 1988 and its decision conflicts with decisions of this Court, federal courts of appeals, and every other state appellate court that has addressed the question.

A. Introduction.

The Court of Appeals held:

"Because respondents were entitled to the relief that they sought under state law, their invocation of 42 U.S.C. § 1983 was unnecessary. Accordingly, the trial court erred in awarding respondents attorney fees under 42 U.S.C. § 1983."

This ruling effectively nullifies § 1988 because almost every conceivable kind of civil rights case is independently

cognizable under state law on non-civil rights grounds.[2]

Based on the Supremacy Clause of the United States Constitution, however, attorney fees under § 1988 are an integral part of the remedy in any 42 U.S.C. § 1983 case "whether the action is brought in federal or state court." Maine v. Thiboutot, 448 U.S. 1, 11, 65 L.Ed.2d 555, 563, 100 S.Ct. 2502, 2508 (1980). Therefore, the ruling that

[2] The following cases are illustrations of valid § 1983 claims that are accompanied by an independent right to relief under state law. City of Riverside v. Rivera, 477 U.S. 561 (1986) (unreasonable search and seizure; common law battery); Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) (first amendment free speech case; independent right to relief under state constitution); Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977) (equal protection voting rights case; parallel state claim); Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980) (unconstitutional deprivation of life; statutory wrongful death).

plaintiffs' § 1983 claim was "unnecessary" is plainly in error.

B. The Oregon Court of Appeals decision below conflicts with the decisions of this Court.

There is no question plaintiffs properly filed federal constitutional claims in state court,^[3] nor that they are "prevailing parties" within the meaning of § 1988. E.g., Hensley v. Eckerhart, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983). Plaintiffs obtained all the relief they sought when the trial court granted a preliminary injunction ordering the state to restore plaintiffs' property interest in their irrigation water.

[3] Howlett v. Rose, 496 U.S. ___, 110 L.Ed.2d 332 (1990).

In Maheer v. Gagne, 448 U.S. 122, 132 (1980), this Court held that a plaintiff is the prevailing party for purposes of an award of attorney fees under § 1988 even when the plaintiff prevails "on a wholly statutory, non civil rights claim pendent to a substantive constitutional claim," 448 U.S. at 132, provided that the winning claim shares a common nucleus of operative fact with the substantial federal constitutional claim. Id.

In Maheer, this Court grounded its holding on clear expressions of legislative intent, construing the legislative history of § 1988 as follows:

"The legislative history makes it clear that Congress intended fees to be awarded where a pendant constitutional claim is involved, even if the statutory

claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying HR 15460, a bill substantially identical to the Senate Bill that was finally enacted, stated: 'To the extent a plaintiff joins a claim under one of the statutes enumerated in HR 15460 with a claim that does not allow attorney fees, the plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.

448 U.S. at 132, n. 15. [4]

The present case falls squarely within the rule of Maher. Plaintiff

[4] The legislative history quoted above is followed by a reference to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *Gibbs* stands for the rule that the federal courts have jurisdiction to entertain pendent state law causes of action when they are properly joined with federal claims. Thus, by citing *Gibbs*, Congress necessarily envisioned that attorney fees would be available where the civil rights claimant is afforded relief on independent state law grounds.

pleaded and proved a substantive constitutional claim. Indeed, the trial court expressly held that plaintiffs' substantive constitutional rights were violated and the state of Oregon does not seriously contend otherwise. Therefore, having prevailed on the merits, plaintiffs were entitled to recover their attorney fees under the rule this Court announced in Maher.

In a similar vein, in Smith v. Robinson, 468 U.S. 922 (1984), this Court said:

"As the legislative history illustrates and as this Court has recognized, § 1988 is a broad grant of authority to courts to award attorneys fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. (citing cases) * * * Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved

on a non-constitutional ground.

468 U.S. at 1006.

C. The legislative history of Section 1988 supports this Court's prior decisions and requires an award of attorney fees in this case.

Congress enacted § 1988 to provide suitable legal representation to all victims of civil rights violations, recognizing that such claimants otherwise would be unable to present their cases in court. Riverside v. Rivera, 477 U.S. 561, 576 (1986). In Riverside, this Court found that Section 1988 embodies the following policy considerations:

1. Plaintiffs who suffer civil rights violations have little or no money with which to hire counsel. 477 U.S. at 576.
2. Many civil rights cases yield no award or only a small award of damages from which

attorneys fees can be paid. Id. at 577.

3. Civil rights litigation serves the public interest insofar as it tends to deter official misconduct. Id. at 578-79.

These legislative objectives are utterly thwarted by the Oregon Court of Appeals' decision in this case. Plaintiff Lowell Saylor is a struggling farmer who faced major crop losses in a year of serious drought conditions. The judicial remedy he sought was equitable in nature, leaving no award of damages to defray the cost of legal representation. He acted as a "private attorney general," vindicating the rights of all the water users in the subject irrigation system. His case stands at the very heart of § 1988. He is entitled

to recover fees under that statute based on the clear mandate of Congress.[5]

Since a potential right to relief under state law now means that § 1988 fees will not be available in Oregon state courts, potential plaintiffs will either be unable to secure legal representation in state courts, or be forced to seek federal judicial protection. This is precisely the problem which Congress sought to remedy

[5] Anticipating *Maier v. Gagne* by three years, Judge Burns held in *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891, 895 (D. Or. 1977), *aff'd.*, 657 F.2d 1118, 1123 (9th Cir. 1981), that "it seems manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious statutory claims and thereby facilitate the federal policy of avoiding unnecessary constitutional decisions. To deny such plaintiffs the attorney fees to which they might otherwise be entitled frustrates rather than promotes the policy of [§ 1988]."

when it amended § 1988 in 1976. Maine v. Thiboutot, supra, 448 U.S. 11, n. 12.

D. The Oregon Court of Appeals' decision below conflicts with the decisions of the federal courts of appeals.

Every reported federal appellate court decision that has considered the issue has held, without exception, that the Maher principle applies where the plaintiff has prevailed on a state law claim that was joined to a substantial federal claim:

"* * * When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under § 1988."

Carreras v. City of Anaheim, 768 F.2d 1039, 1050 (9th Cir. 1985) (ordinance regulating solicitation of donations

violated California Constitution; federal constitutional claims not reached; § 1988 fees awarded).[6]

[6] Accord, *Seaway Drive-in, Inc. v. Township of Clay*, 791 F.2d 447, 450-52 (6th Cir.), cert. den., 479 U.S. 884, 93 L.Ed.2d 251, 107 S.Ct. 274 (1986), (drive-in theatre ordinance voided on state statutory grounds; fees awarded on § 1983 constitutional claims not reached); *Exeter-West Greenwich Regional School v. Pontarelli*, 788 F.2d 47, 52 (1st Cir. 1986) (§ 1983 claim dismissed as moot when state court on certification from federal district court, granted plaintiff's relief under state law; § 1988 fees awarded); *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978) (State welfare policy invalidated under Social Security Act; fees awarded on concurrent § 1983 claims); *State of New York v. 11 Cornwell Company*, 718 F.2d 22, 25 n. 3 (2d Cir. 1983) (en banc) (plaintiff prevails on state law claim, awarded fees on undecided substantial § 1983 claim); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982) cert. den. sub. nom. *Dallas County, Texas v. Williams*, 462 U.S. 1133, 77 L.Ed.2d 1369, 103 S.Ct. 3115, (1983) (plaintiff prevailed on state tort claim; § 1988 fees awarded on undecided § 1983 due process claim); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 426-27 (8th Cir. 1978) (plaintiff prevailed on construction of state athletic rule; § 1988 fees awarded on undecided civil rights claims). See also, *Milwe v. Cavuoto*, 653 F.2d 80, 84 (2d Cir. 1981) (plaintiff prevails on state court claims, with nominal damages on (continued)

In Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977), the Sixth Circuit addressed a voting rights claim which had been brought under § 1983 as well as under state law. Although the case was resolved exclusively under state law, 562 F.2d at 392, the court held that the § 1983 claim did not disappear "because relief is rendered on an alternative state law ground." 562 F.2d at 394. The court further stated:

"Congress clearly has the power in such circumstances to authorize attorneys fees as a matter of federal law, and it equally clearly has done so."

Id.

§ 1983 claim; attorney fees awarded, quoting Maher, supra.)

E. The Oregon Court of Appeals' position below is in conflict with the decisions of all the other state appellate courts that have addressed the question.

Except for the Oregon Supreme Court's plainly unconstitutional ruling in Oregon State Police Ass'n v. State of Oregon, supra, upon which the Oregon Court of Appeals relied, every state appellate decision has held that § 1988 attorney fees should be awarded under the circumstances presented in this case.[7]

[7] Davis v. Everett, 443 S.2d 1232, 1235-36 (Ala. 1983) (plaintiff prevails on state constitutional claim for liquor license; equal protection claim under § 1983 not reached; fees awarded under § 1988); Best v. California Apprenticeship Council, 240 Cal.Rptr. 1 (Cal.App. 1987) (state statutory construction avoids First Amendment § 1983 claim; § 1988 fees awarded); Gumbhir v. Kansas State Board of Pharmacy, 231 (continued)

As the Massachusetts Supreme
Judicial Court said in Stratos v.
Department of Public Welfare, 387 Mass.
312, 439 N.E.2d 778 (1982):

Kan. 507, 646 P.2d 1078, 1086 (1982) (principle of Maher quoted, but fees denied for lack of common nucleus of operative fact and federal claims found to lack merit); County Exec., Prince George's County v. Doe, 300 Md. 445, 479 A.2d 352, 358 (1984) (plaintiff prevails on state ground; § 1988 fees awarded on § 1983 claim not reached); Draper v. Town Clerk of Greenfield, 425 N.E.2d 333, 339 (Mass. 1981) (plaintiff prevails on state statutory interpretation, state and federal constitutional questions avoided; § 1988 fees awarded); Bung's Bar & Grille, Inc. v. Florence Tp, 206 NJ Super. 482, 502 A.2d 1198, 1216-1218 (1985) (plaintiff prevails on state grounds; § 1988 fees awarded on § 1983 claim not reached); Young v. Toia, 66 A.D.2d 377, 413 N.Y. Supp. 2d, 530, 531-32 (1979) (plaintiff prevails on state claim; § 1988 fees awarded on federal claim not reached); Johnson v. Blum, 58 N.Y.2d 454, 461, N.Y. Supp.2d 782, 448 N.E.2d 449 (1983); Doe v. Cuddy, 21 Ohio App. 3d 370, 487 N.E.2d 914, 916-917 (1985) (state welfare regulation void under Ohio statute; § 1983 constitutional claims not reached; § 1988 fees awarded); Intern. Ass'n. of Machinists v. Affleck, 504 A.2d 468, 470-71 (R.I. 1986); City of Fort Gates v. Cathey, 665 S.W.2d 586 (Texas App. 1984) (plaintiff prevails on state claim; federal § 1983 claims not reached; § 1988 fees awarded).

"Section 1983 provides an independent remedy for violation of rights protected by federal law. If such a right is at issue, the Section 1983 remedy is available, even if the State has also provided a means of obtaining relief. (citing cases) * * * [T]he fee incentive is equally useful and necessary whether the right in question is secured by federal law alone, or by state law as well. Therefore, the fact that a plaintiff claiming relief under Section 1983 could have obtained relief solely by means of a state remedy -- even a "routine" one -- did not foreclose a fee award."

439 N.E.2d at 783 (citing Maher v. Gagne, supra, at n. 15).

CONCLUSION

The answer to the question posed in this case will have broad effects on the enforcement of civil rights in federal and state courts, on federal dockets and on the balance between state and federal judicial power. This court should

restore the balance disturbed by the decision below.

For all of the foregoing reasons, the Writ of Certiorari should be granted and the Oregon Court of Appeals' decision should be reversed. The case should be remanded for reinstatement of the attorney fee awards below and for an award of fees on appeal and on this petition for certiorari.

Respectfully submitted,

DUNN, CARNEY, ALLEN,
HIGGINS & TONGUE

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APPENDIX TO
Petition for Writ of Certiorari
to the Court of Appeals of the
State of Oregon

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IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SAYLOR, LOWELL ET AL)	
OREGON TRAIL RANCHES,)	ORDER DENYING
INC., ALFALFA ACRES,	)	REVIEW
INC.,)	
	)	CA A50953
Plaintiffs	)	SC S37073
Respondents.)	
)	
v.)	
)	
WATER RESOURCES)	
DEPT., LADD,)	
MICHAEL F.,)	
)	
Defendants)	
Appellants.)	
AMMON, COLUSI)	
ASHBECK, LEO)	
BRITT, SIDNEY)	
COCHRAN, GLEN)	
CORREA, JOHN E.)	
CORREA, JOHN B.)	
GRAHM, DELBERT BUD)	
HALE BROS., INC.)	
HAWKINS, BOB)	
MADER, FRANK)	
MADISON RANCHES,)	
INC.)	
MADISON, JOHN)	
MCCARTY, MIKE)	
MYERS, JERRY)	
MUELLER, FRANK)	
PEDRO, FRANK)	
SCHILLER, ROBERT)	
WITHERITE, WELDON)	

CHOWNING, GLEN)
WATTENBERGER, BURL)
)
Defendants)

The Court has considered the petition for review and ORDERS that it be denied.

DATED: JUNE 19, 1990.

/s/ Edwin J. Peterson

Edwin J. Peterson
Chief Justice

Graber, J. not participating

COPIES TO:

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Petitioner
Rives Kistler Attorney for:
Respondent

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SAYLOR, LOWELL ET AL)	
OREGON TRAIL RANCHES,)	ORDER DENYING
INC., ALFALFA ACRES,)	RECONSIDERATION
INC.,)	
Plaintiffs)	CA A50953
Respondents.)	SC S37073
v.)	
WATER RESOURCES)	
DEPT., LADD,)	
MICHAEL F.,)	
Defendants)	
Appellants.)	
AMMON, COLUSI)	
ASHBECK, LEO)	
BRITT, SIDNEY)	
COCHRAN, GLEN)	
CORREA, JOHN E.)	
CORREA, JOHN B.)	
GRAHM, DELBERT BUD)	
HALE BROS., INC.)	
HAWKINS, BOB)	
MADER, FRANK)	
MADISON RANCHES,)	
INC.)	
MADISON, JOHN)	
MCCARTY, MIKE)	
MYERS, JERRY)	
MUELLER, FRANK)	
PEDRO, FRANK)	
SCHILLER, ROBERT)	
WITHERRITE, WELDON)	

CHOWNING, GLEN)
WATTENBERGER, BURL)
)
Defendants)

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on May 16, 1990, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ George M. Joseph
CHIEF JUDGE

Copies to:

John C. Cahalan	Attorney for:
	Respondent
Rives Kistler	Attorney for:
	Appellant

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

LOWELL SAYLOR, OREGON
TRAIL RANCHES, INC. and
ALFALFA ACRES, INC., Respondents,

v.

STATE OF OREGON WATER
RESOURCES DEPARTMENT;
MICHAEL F. LADD, WATERMASTER,
DISTRICT 5, OF THE STATE OF
OREGON WATER RESOURCES
DEPARTMENT, Appellants,

and

COLUSI AMMON; LEO
ASHBECK; SIDNEY BRITT;
GLEN COCHRAN; JOHN E.
CORREA; JOHN B. CORREA;
DELBERT BUD GRAHAM;
HALE BROS., INC., an
Oregon corporation; BOB
HAWKIN ; FRANK MADER;
MADISON RANCHES, INC.,
an Oregon corporation;
JOHN MADISON; MIKE
McCARTY; JERRY MYERS;
FRANK MUELLER; FRANK
PEDRO; ROBERT SCHILLER;
WELDON WITHERRITE; GLEN

CHOWNING and BURL
WATTENBERGER,

Defendants.

(CV-88-283; CA A50953)

Appeal from Umatilla County,
Circuit Court.

J.F. Olsen, Judge.

Argued and submitted January 29,
1990.

Rives Kistler, Assistant Attorney
General, Salem, argued the
cause for appellants. With him
on the briefs were Dave
Frohnmayr, Attorney General,
and Virginia L. Linder,
Solicitor General, Salem.

John C. Cahalan, Portland, argued
the cause for respondents.
With him on the brief was Dunn,
Carney, Allen, Higgins &
Tongue, Portland.

Before Graber, Presiding Judge, and
Riggs and Edmonds, Judges.

PER CURIAM

Reversed.

saylor.opn

FILED: March 14, 1990

PER CURIAM

Respondents are owners of land located in Umatilla County and of water rights in Butter Creek. Pursuant to a 1916 court decree, they are entitled to accumulate water to preserve their water rights. In 1988, appellants refused to allow accumulation of water until all water users had signed a use agreement. Respondents filed a complaint in circuit court requesting declaratory and injunctive relief under 42 USC § 1983 and ORS ch 28. They successfully obtained a preliminary injunction and, pursuant to 42 USC § 1988,¹ were awarded attorney fees, which is the subject of the appeal.

The right to use water is a vested property interest entitled to judicial protection. Skinner v. Jordan Val. Irr.

Dist., 137 Or. 480, 491, 300 P. 499, 3 P.2d 534 (1931). ORCP 79A(1)(b) provides an adequate state remedy for the protection of that interest. See also ORS 540.740.² Because respondents were entitled to relief that they sought under state law, their invocation of 42 USC § 1983 was unnecessary. Accordingly, the trial court erred in awarding respondents attorney fees under 42 USC § 1988. Oregon State Police Assn. v. State of Oregon, 308 Or. 531, 538, 783 P.2d 7 (1989).

Reversed.

FOOTNOTES

1

42 USC § 1988 states:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

2

ORS 540.740 provides:

"Any person who may be injured by the action of any watermaster may appeal to the circuit court for an injunction. The injunction shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water."

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

LOWELL SAYLOR,	)	Case No.
et al.,	)	CV-88-283
)	
Plaintiffs,)	
)	
v.)	
	)	ORDER ALLOWING
STATE OF OREGON	)	PLAINTIFFS'
WATER RESOURCES	)	MOTION FOR
DEPARTMENT,	)	AWARD OF
et al.,	)	ATTORNEY FEES
)	
Defendants.)	

On August 3, 1988, plaintiffs filed a motion for attorney fees pursuant to 42 U.S.C. § 1988.

After considering the motion and briefing and the statements of counsel at the hearing, the Court entered a Memorandum of Opinion dated October 4, 1988, ruling that plaintiffs' motion for attorney fees should be allowed. Plaintiffs' counsel subsequently filed a

statement of their allowable costs and attorney fees accompanied by an affidavit of plaintiffs' counsel itemizing these expenses. Based on the statement of costs and the affidavit of plaintiffs' counsel, the Court has determined that plaintiffs are entitled to judgment against the State of Oregon Water Resources Department pursuant to 42 U.S.C. § 1988 for attorney fees and costs in the sum of \$9,779.86. Furthermore, the Court has concluded that, in prevailing on their application for a preliminary injunction, plaintiffs obtained the practical equivalent of all the relief they were seeking in this case. For these results, the Court has concluded that the judgment for costs and attorney fees should contain a recital pursuant to Rule 67B of the Oregon Rules

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of Civil Procedure that there is no just reason for delay and that the judgment should be entered in the record forthwith.

IT IS SO ORDERED.

Dated this 15th day of December,
1988.

/s/ J.F. Olsen
J.F. OLSEN
CIRCUIT COURT JUDGE

Presented by:

John C. Cahalan, OSB #84151
Dunn, Carney, Allen,
Higgins & Tongue
851 S.W. Sixth Avenue, Suite 1500
Portland, Oregon 97205
(503) 224-6440

Attorneys for Plaintiffs

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IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR UMATILLA COUNTY

LOWELL SAYLOR,)	
OREGON TRAIL	)	CV 88-283
RANCHES, INC.,)	
and ALFALFA ACRES,)	
INC.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE OF OREGON	)	Memorandum
WATER RESOURCES	)	of Opinion
DEPARTMENT; MICHAEL)	
F. LADD, WATER)	
MASTER, DISTRICT)	
5, OF THE STATE)	
OF OREGON WATER)	
RESOURCES)	
DEPARTMENT, et al.,)	
)	
Defendants.)	

The Water Resources Department asserts that Plaintiffs are not entitled to attorney fees under 42 U.S.C. 1988 because they have failed to establish a claim under 42 U.S.C. 1983. They say that plaintiffs are not denied procedural

due process because they are provided the right to a hearing under ORS 540.740 and 540.750.

These assertions fail, however, because ORS 540.740 provides for a hearing for injunctive relief by "(a)ny person who may be injured by the action of the watermaster." Emphasis supplied.

In this action plaintiffs were already injured by the action of the watermaster. They were told under paragraph 7 of the distribution plan that their accumulated water rights would not be recognized until they signed the plan. This restriction was imposed after the starting date for plaintiffs' accumulated water rights and drought conditions exacerbated the situation. Thus, plaintiffs were in fact denied

their accumulated water rights from January 19, 1988 until March 21, 1988.

This court's opinion was that the watermaster's plan was an unauthorized deprivation of plaintiffs' water rights. Those rights were property interests thus plaintiffs were denied substantive due process under the U.S. Constitution.

Attorney fees are allowed pursuant to 42 U.S.C. 1988.

DATED this 4th day of October, 1988.

s/ J.F. Olsen

J.F. OLSEN

Circuit Judge

JFO/dm

cc John C. Cahalan
Robert A. Petersen

CIRCUIT COURT OF OREGON

Judge J.F. Olsen
Sixth Judicial District
P.O. Box 547
Pendleton, Oregon 97801

May 13, 1988

Addressees below:

Re: Saylor v. Water Resources Dept.,
CV 88-283

However necessary it was for the Water Resources Department to fashion a workable agreement the procedure they followed was to suggest that the users either agree or else face the ultimatum.

Paragraph 7 of the 1988 agreement has the effect of a unilateral modification of the 1916 decree and was imposed after the starting date for accumulation rights. This forfeiture provision has no basis for validity within the decree which specifically provided that no system could interfere with prior existing rights which have already been established.

Although the Water Resources Department has the authority to implement a plan upon agreement of two or more users they may not do so to the detriment

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of the existing rights of other users who do not agree.

A preliminary restraining order and injunction will issue. Bond is set at \$20,000 unless the parties agree to a different amount.

J.F. OLSEN
Circuit Judge

JFO/dm

Addressees:

John C. Cahalan
Robert A. Petersen

cc: Official File

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

LOWELL SAYLOR, OREGON)
TRAIL RANCHES, INC.)
and ALFALFA ACRES, INC.,)
Plaintiffs)

v.)

STATE OF OREGON WATER)
RESOURCES DEPARTMENT;)
MICHAEL F. LADD,)
WATERMASTER, DISTRICT 5,)
OF THE STATE OF OREGON)
WATER RESOURCES)
DEPARTMENT; COLUSI AMMON;)
LEO ASHBECK; SIDNEY)
BRITT; GLEN COCHRAN;)
JOHN E. CORREA;)
JOHN B. CORREA; DELBERT)
BUD GRAHM; RALE BROS.,)
INC., an Oregon corpor-)
ation; BOB HAWKINS;)
FRANK MADER; MADISON)
RANCHES, INC., an Oregon)
corporation; JOHN)
MADISON; MIKE McCARTY;)
JERRY MYERS; FRANK)
MUELLER; FRANK PEDRO;)
ROBERT SCHILLER; WELDON)
WITHERRITE, GLEN)
CHOWNING and BURL)
WATTENBERGER,)

Defendants.)

Case No.
CV-88-283

PRELIMINARY
INJUNCTION

Plaintiffs Lowell R. Saylor, Oregon Trail Ranches, Inc. and Alfalfa Acres, Inc. have filed an application for a preliminary injunction directed to defendants State of Oregon Water Resources Department and Michael F. Ladd ("State Defendants"). The application was presented in open court on May 12, 1988. Plaintiffs appeared by their attorney, John C. Cahalan. State Defendants appeared by their attorney, Robert A. Petersen.

Having considered the statements of counsel and the evidence presented at the May 12, 1988 hearing, and being duly advised, the Court has determined that a preliminary injunction should be entered in this case against the State Defendants to the extent set forth in this order.

A preliminary injunction is warranted under Rule 79 of the Oregon Rules of Civil Procedure because it appears at this time that plaintiffs are entitled to the relief they request pursuant to the second claim for relief of their complaint, which relief consists of restraining the continuance of conduct that will produce injury to plaintiffs during the pendency of this litigation, and because it appears that the State Defendants are presently engaged in conduct in violation of plaintiffs' decreed water rights concerning the subject matter of this case, which conduct, if allowed to continue, would render ineffectual any eventual judgment in favor of plaintiffs.

This case concerns the irrigation method known as "accumulation" as it is

practiced in Butter Creek, a tributary of the Umatilla River. At the hearing, plaintiffs contended that, under the existing water-rights decree of this court and as a matter of long-established custom and practice, their accumulation rights for this irrigation season should have taken effect not later than February 11, 1988. The State Defendants contended that they were not obligated to afford accumulation rights to plaintiffs until such time as plaintiffs signed a written distribution plan for the 1988 irrigation season in Butter Creek. After considering all the evidence and argument presented at the hearing, it appears to the Court that plaintiffs are entitled to be afforded accumulation rights in 1988 with an effective date of February 11, 1988 and that plaintiffs will sustain

irreparable harm in the form of presently incalculable crop losses unless they are afforded the relief provided in this order. It further appears that plaintiffs are likely to prevail on the merits with respect to their claim for permanent injunctive relief.

Accordingly, the Court now orders as follows pursuant to Rule 79 of the Oregon Rules of Civil Procedure:

1. Defendants State of Oregon Water Resources Department and Michael F. Ladd, Watermaster of the State of Oregon Water Resources Department, are hereby ordered to afford accumulation for plaintiffs and for each of the defendant water-users effective February 11, 1988 for the 1988 irrigation season.

2. Except as otherwise provided in this Order, all other terms and

provisions of the irrigation plan known as the "Butter Creek Distribution Plan for 1988" ("Plan") shall remain in full force and effect.

3. In accordance with the directions of this Court, defendants State of Oregon Water Resources Department and Michael F. Ladd, Watermaster of the State of Oregon Water Resources Department, are hereby ordered to make reasonable efforts to determine who received water from Butter Creek after February 10, 1988 and before February 19, 1988 and to adjust their accumulation rights in accordance with the Plan based upon their usage during that period of time.

Plaintiffs shall post a bond in the sum of \$20,000 within five (5) days after the date of this order.

IT IS SO ORDERED.

DATED this 17th day of May, 1988.

/s/ J.F. Olsen
Umatilla Circuit Court Judge

PRESENTED BY:

John C. Cahalan
DUNN, CARNEY, ALLEN, HIGGINS & TONGUE
851 S.W. Sixth Avenue, Suite 1500
Portland, Oregon 97204
Telephone: (503) 224-6440

Attorneys for Plaintiffs

IN THE CIRCUIT COURT
OF THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

LOWELL SAYLOR, OREGON)
TRAIL RANCHES, INC.)
and ALFALFA ACRES, INC.,)
Plaintiffs)

v.)

STATE OF OREGON WATER)
RESOURCES DEPARTMENT;)
MICHAEL F. LADD,)
WATERMASTER, DISTRICT 5,)
OF THE STATE OF OREGON)
WATER RESOURCES)
DEPARTMENT; COLUSI AMMON;)
LEO ASHBECK; SIDNEY)
BRITT; GLEN COCHRAN;)
JOHN E. CORREA;)
JOHN B. CORREA; DELBERT)
BUD GRAHM; RALE BROS.,)
INC., an Oregon corpor-)
ation; BOB HAWKINS;)
FRANK MADER; MADISON)
RANCHES, INC., an Oregon)
corporation; JOHN)
MADISON; MIKE McCARTY;)
JERRY MYERS; FRANK)
MUELLER; FRANK PEDRO;)
WILLAMETTE PRODUCTION)
CREDIT ASSOCIATION IN)
LIQUIDATION; ROBERT)
SCHILLER; WELDON)

Case No.
CV-88-283

AMENDED
COMPLAINT
FOR
DECLARATORY
JUDGMENT AND
INJUNCTION

WITHERITE, GLEN)
CHOWNING and BURL)
WATTENBERGER,)
)
Defendants.)

Plaintiffs allege:

PARTIES AND JURISDICTION

1.

Plaintiff Lowell R. Saylor is a citizen and resident of the State of Oregon and, at all material times, has been the owner of certain agricultural real property in Umatilla County, Oregon, together with the concomitant water rights. Plaintiff Alfalfa Acres, Inc. is an Oregon corporation with its principal place of business in the State of Oregon and, at all material times, has been the owner of certain agricultural real property located in Umatilla County, Oregon, together with the concomitant

water rights. Plaintiff Oregon Trail Ranches, Inc. is an Oregon corporation with its principal place of business in the State of Oregon and has used the above-referenced real property in consideration for transferring to the owners a portion of the annual crop yield of the property.

2.

Defendant State of Oregon Water Resources Department ("Department") is a department of the government of the State of Oregon. Defendant Michael F. Ladd ("Watermaster") is a citizen and resident of the State of Oregon and, at all material times, has been a person employed by the Department as a Watermaster within the meaning of Oregon Revised Statutes § 540.020. The other named defendants have been joined as

defendants herein solely to enable them to assert their interests, if any, in the controversy.

3.

This case presents an actual controversy within the jurisdiction of this court, such that declaratory relief and corresponding injunctive relief are warranted under ORS 28.010, et seq.

STATEMENT OF CLAIMS

First Claim for Relief:

Request for Declaratory Judgment

4.

The agricultural productivity of plaintiffs' real property is dependent upon the application of irrigation water derived from Butter Creek and Five Mile Creek, which are natural surface public water sources. Pursuant to Oregon Revised Statutes § 540.045, the

Department and the Watermaster are required to regulate the distribution of water from Butter Creek and Five Mile Creek in accordance with plaintiffs' existing water rights of record in the office of the Department and as set forth in related court decrees.

5.

The records of the Department include and acknowledge the Butter Creek Decree of the Circuit Court of Umatilla County dated September 9, 1916, which affirmed and adopted in relevant part the Findings and Order of Determination of the Board of Control dated January 22, 1912. By the terms of the Butter Creek Decree, a water user is entitled: (1) to divert and use the water user's proportionate share of water at any time after the commencement of the annual

irrigation season when sufficient water is available in Butter Creek to satisfy the user's rights, and (2) to continue such use until the user has received the full entitlement of water for the season. As water users under the Decree, plaintiffs are also entitled to forego the early use of water and to divert and use water at a later time when it can be used more effectively for their property. This procedure is known as the right of "accumulation." Plaintiffs are entitled to exercise these rights of accumulation under the terms of the Findings and Order as adopted and affirmed by the Butter Creek Decree and by custom and usage which has been followed by the other water users and by the Department and its predecessors at least since the inception of the water

rights at issue in this case.

6.

The Department and defendant Watermaster exercise control over the distribution of water in Butter Creek. In that capacity, they have prepared an irrigation plan known as the "Butter Creek Distribution Plan" for 1988. Defendants have insisted that all water users in the Butter Creek distribution area, including plaintiffs, sign the Distribution Plan in order to exercise their accumulation rights in 1988.

7.

Paragraph 7 of the Distribution Plan provides that accumulation rights will not accrue until the agreement has been signed by all water users, and paragraph 6 of the Distribution Plan provides that accumulation rights will not be

recognized for water users who fail to execute the plan. As a result of these provisions, plaintiffs were faced with the intolerable choice of either (1) signing the plan and forfeiting previously accrued accumulation rights; or (2) refraining from signing the plan and thereby forfeiting their accumulation rights for the entire season. Plaintiffs signed the Plan on March 21, 1988 only after the Department agreed that this would not be asserted as a waiver of their right to litigate their entitlement to additional accumulation rights.

8.

The Department's and the Watermaster's refusal to recognize the accumulation rights that accrued to plaintiffs prior to March 21, 1988 constitutes a taking of plaintiffs'

property without just compensation and a denial of plaintiffs' property rights without due process of law, all in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

9.

The foregoing refusal to recognize plaintiffs' accumulation rights also constitutes a violation of the Department's and the Watermaster's obligations and duties to plaintiffs under the terms of the decree.

10.

Plaintiffs' accumulation rights also arise as a matter of private contract between plaintiffs and the other water users exercising rights under the Butter Creek Decree. The denial of plaintiffs' accumulation rights therefore amounts to

an impairment of contractual obligations in violation of Section 10 of Article I of the Constitution of the United States.

11.

In denying plaintiffs' accumulation rights, the Department and the Watermaster have acted under color of the laws, regulations, customs or usages of the State of Oregon in violation of plaintiffs' rights, privileges and immunities secured by the Constitution and laws of the United States. Plaintiffs are therefore entitled to secure redress of these rights pursuant to 42 U.S.C. § 1983.

12.

Because this is an action or proceeding to enforce the provisions of 42 U.S.C. § 1983, plaintiffs would be entitled to an award of their reasonable

attorney fees pursuant to 42 U.S.C. § 1988 should they prevail in this action.

Second Claim for Relief:

Request for Preliminary and Permanent Injunctive Relief

13.

Paragraphs 1 - 12 are realleged.

14.

Plaintiffs have no adequate remedy at law to redress the violations alleged herein. The agricultural productivity of plaintiffs' real property will be substantially impaired and irreparable harm will inevitably result unless defendants are restrained from abridging plaintiffs' accumulation rights.

WHEREFORE, plaintiffs pray for relief as follows:

1. On their first claim for relief,

a judgment and decree that defendants are not entitled to insist on a waiver of plaintiffs' accumulation rights as a condition to plaintiffs' participation in the 1988 distribution plan.

2. On their second claim for relief, an order and decree pursuant to ORS 28.080 restraining defendants from denying plaintiffs' accumulation rights.

3. An award of plaintiffs' reasonable costs and attorney fees pursuant to 42 U.S.C. § 1988 and such further relief as the Court may deem appropriate.

DATED this 3rd day of May, 1988.

DUNN, CARNEY, ALLEN,
HIGGINS & TONGUE

By: /s/ John C. Cahalan
John C. Cahalan
Attorneys for Plaintiff

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LOWELL SAYLOR, et al.,

Petitioners,

vs.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE STATE
OF OREGON WATER RESOURCES DEPARTMENT,

Respondents.

AFFIDAVIT OF MAILING
PETITION FOR CERTIORARI

STATE OF OREGON)

: ss.

County of Multnomah)

George J. Cooper, III, being duly
sworn, deposes and says:

I am a member of the Bar of the
Supreme Court of the United States.

On September 17, 1990, at
approximately _____ p.m., I deposited in
the mailbox at the Main Office Station,
715 N.W. Hoyt Street, Portland, Oregon,
an envelope addressed to the Clerk of the
Supreme Court of the United States,
first-class postage prepaid, containing
40 copies of the petition for certiorari
in the above-entitled case.

George J. Cooper, III
Counsel of Record
851 S.W. Sixth Avenue, Suite 1500
Pacific First Federal Building
Portland, Oregon 97204-1357
(503) 224-6440

Counsel for Petitioners

SUBSCRIBED AND SWORN to before me
this 17th day of September, 1990.

Notary Public for Oregon

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LOWELL SAYLOR, et al.,

Petitioners,

vs.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE STATE
OF OREGON WATER RESOURCES DEPARTMENT,

Respondents.

CERTIFICATE OF SERVICE

I, George J. Cooper, III, a member
of the Bar of this Court, hereby certify
that on this 17th day of September, 1990,
three copies of the Petition for Writ of
Certiorari in the above-entitled case
were mailed, first-class postage prepaid,
to the following listed persons
representing all parties to the

proceedings below who are not petitioners herein. I further certify that all parties required to be served have been served.

Solicitor General
Department of Justice
Washington, D.C. 20530

Rives Kistler
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
(503) 378-4402

Counsel for Respondents

George J. Cooper, III
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Portland, Oregon 97204-1397
(503) 224-6440

Counsel for Petitioners

FILED
DEC 12 1990

JOSEPH P. SPANGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

**LOWELL SAYLOR, OREGON TRAIL
RANCHES, INC., and ALFALFA
ACRES, INC.,**

Petitioners,

v.

**STATE OF OREGON WATER
RESOURCES DEPARTMENT,
and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5,
OF THE STATE OF OREGON
WATER RESOURCES DEPARTMENT,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF OREGON**

RESPONDENTS' BRIEF IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
***VIRGINIA L. LINDER**
Solicitor General
RIVES KISTLER

Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondents

QUESTION PRESENTED

Are plaintiffs entitled to attorney fees under 42 U.S.C. § 1988 when they conceded before the state trial court that their federal constitutional claim was unnecessary to their success on their state law claim?



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STATE OF NEW YORK

1891

OFFICE OF THE COMMISSIONER OF THE LAND OFFICE

ALBANY, N. Y.

1891

TO THE HONORABLE SENATE AND ASSEMBLY

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1, 1891

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THE WHITE HOUSE

THE PRESIDENT'S OFFICE

THE VICE PRESIDENT'S OFFICE

THE SECRETARY OF STATE'S OFFICE

THE DEPARTMENT OF JUSTICE

THE DEPARTMENT OF AGRICULTURE

THE DEPARTMENT OF COMMERCE

THE DEPARTMENT OF THE INTERIOR

THE DEPARTMENT OF WAR

THE DEPARTMENT OF THE NAVY

THE DEPARTMENT OF THE ARMY

THE DEPARTMENT OF THE COAST AND GEODETIC SURVEY

THE DEPARTMENT OF THE INSULAR AFFAIRS

THE DEPARTMENT OF THE DISTRICT OF COLUMBIA

THE DEPARTMENT OF THE DISTRICT OF COLUMBIA

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THE DEPARTMENT OF THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

Defendants accept plaintiffs' statement of the opinions below and the constitutional and statutory provisions involved.¹

JURISDICTION

Although plaintiffs filed a timely petition for certiorari, the state court judgment is not final in that it does not resolve all plaintiffs' claims against defendants. See 28 U.S.C. § 1257(a). The Court, however, has jurisdiction under section 1257(a) because the judgment may be considered final under the second exception identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). See note 7 *infra*.

STATEMENT OF THE CASE

This case arises out of a dispute over a 1916 state water rights decree. The decree allocates among various users the right to take a specified number of cubic feet per second of water from Butter Creek,² it sets the priority of use, and it describes the way in which water will be distributed. Because of the limited stream flow in Butter Creek, taking a steady stream of water from the creek did not provide sufficient water to irrigate a user's fields in 1916.³ Accordingly, a practice known as accumulation arose where one farmer would use the entire stream flow for a short period of time and effectively

¹ Plaintiffs quote the Supremacy Clause and the Fifth Amendment as the two constitutional provisions that are pertinent to their petition. (Pet. Cert. 4-5). Because, as explained below, plaintiffs limited themselves to the claim that the state's actions violated substantive due process, it would appear that the Fourteenth, not the Fifth Amendment is the relevant constitutional provision.

² Butter Creek is located in eastern Oregon, which is more arid than the western part of the State. The stream flow in Butter Creek diminishes during the year, and the creek usually goes dry in June or July.

³ In 1916, fields typically were irrigated by flooding.

borrow against his future right to draw a more limited steady stream of water. The users who deferred taking water would accumulate their water rights for future use.

The Oregon Attorney General's office determined that this local practice violated the 1916 decree, unless the water users signed an agreement each year adopting the practice. Acting on the Attorney General's advice, defendant Michael Ladd, the local watermaster, told the water users that if they wanted to distribute water by accumulation, they would have to sign an agreement. Until they did, they would continue to receive a steady stream of water pursuant to the 1916 decree. Three of the water users, plaintiffs in state court and petitioners here, declined to sign the agreement.⁴ Although plaintiffs did not object to any of the agreement's terms, which effectively described the practice of accumulation, they did object to being denied the right to accumulate until they signed the agreement.

Plaintiffs sued in state court claiming that requiring them to sign the agreement violated both the 1916 decree and "plaintiffs' rights, privileges and immunities secured by the Constitution and the laws of the United States." (Complaint, ¶¶ 9-11). Shortly after they filed suit, plaintiffs moved for a preliminary injunction solely on the ground that the 1916 decree contemplated that water rights would be distributed by accumulation. (See Plaintiffs' Motion and Memorandum for a Preliminary Injunction at 1).⁵ The state trial court granted their motion. It found that because the 1916 water rights decree did authorize accumulation, no prior signature was or could be required.

⁴ The three users were Lowell Saylor, Oregon Trail Ranches, Inc., and Alfalfa Acres, Inc. The two corporate entities are controlled by Saylor and, for all practical purposes, are indistinguishable from him.

⁵ Plaintiffs' memorandum did not refer to federal law as a basis for requesting injunctive relief. Rather, it relied solely on state law.

At the hearing on the preliminary injunction motion and before the trial court issued its ruling, defendants moved to strike plaintiffs' federal claims from the complaint.⁶ Plaintiffs responded that defendants' motion to strike was premature. They argued:

Whether those [federal] paragraphs are in the case or not in the case, for the purposes of the application for preliminary injunction, it *doesn't make any difference because what we're asking the Court to do is today, Your Honor, is to enforce the [1916 state water rights] decree.*

(Tr. 92; emphasis added). Plaintiffs noted their position that substantive due process precluded the state from acting arbitrarily, but added:

But again, those Motions to Strike[,] Your Honor, I think are properly considered by the Court at a later time. We don't really need to talk about them today, because what we're asking for is a preliminary injunction.

(*Id.*). The state trial court agreed that defendants' motion to strike the federal claims was premature. (Tr. 93-94). It reasoned: "This is not a hearing on the merits, it's a hearing for preliminary injunction, and other relief." (*Id.*).

After the state trial court issued the preliminary injunction, plaintiffs sought attorney fees, pursuant to section 1988, for the work their attorneys had done to obtain the preliminary injunction. The trial court awarded them fees and entered partial final judgment for those fees. OR. R. Civ. P. 67B.⁷ The state appealed the partial judgment, the Oregon

⁶ Motions to strike are used more frequently in state than in federal practice. Had defendants been in federal court, the comparable motion would have been a Rule 12(b)(6) motion to dismiss plaintiffs' federal claim.

⁷ Rule 67B, like its federal counterpart, Rule 54(b), FED. R. Civ. P., allows a trial court to enter judgment on fewer than all the claims. Since plaintiffs obtained the preliminary injunction, they have not pursued the underlying merits of their claims further. It appears that the partial judgment for which plaintiffs seek review will not be altered by any subsequent proceedings and is final for the purposes of section 1257(a).

Court of Appeals reversed, *Saylor v. Water Resources Dept.*, 100 Or. App. 745, 788 P.2d 494 (1990), and the Oregon Supreme Court denied discretionary review, 310 Or. 122, 794 P.2d 794 (1990). Plaintiffs have petitioned for a writ of certiorari to the Oregon Court of Appeals to review its judgment.

Before turning to the reasons why certiorari should be denied, it is perhaps helpful to describe the nature of plaintiffs' federal claim. Plaintiffs' federal constitutional theories at trial were broad. They argued that requiring them to sign an agreement took their water rights. They presented their federal argument as an amalgam of procedural due process, substantive due process, and a takings claim. In response to defendants' appeal in the state court, plaintiffs limited their federal claim to substantive due process. (Resp. Br. 6). Arguing that "*Muller [v. Oregon, 208 U.S. 412 (1908)]* is the leading decision of the United States Supreme Court relating to the scope of *substantive due process*," (Resp. Br. 9; emphasis in original), plaintiffs contended that the State's interpretation of the 1916 water rights decree was arbitrary and irrational.

REASONS TO DENY CERTIORARI

The question presented by the facts of this case is neither difficult nor significant. The Court has held that when a plaintiff joins a non-fee generating claim and a fee generating claim, the fact that the case is decided on the basis of the non-fee claim does not preclude an award of fees under section 1988. *Maher v. Gagne*, 448 U.S. 122 (1980). Rather, attorney fees may be awarded "when the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts" *Smith v. Robinson*, 468 U.S. 992, 1002 (1984).

The Court has been careful to recognize, however, that "[d]ue regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on

which effort was expended and the ultimate relief obtained." *Id.*, at 1006. It accordingly noted that "where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley v. Eckerhart*, [461 U.S. 425 (1983),] requires that fees not be awarded on the basis of those claims." *Id.*, at 1009 n. 12.

These well-settled principles control this case. Plaintiffs told the state trial court that their federal claim "doesn't make any difference [to the relief they requested] because what we're asking the Court to do . . . today, Your Honor, is to enforce the [1916 state water rights] decree." It is hardly surprising that the Oregon Court of Appeals reversed the attorney fee award because plaintiffs' federal claim was "unnecessary" to the relief they obtained. See *Saylor v. Water Resources Dept.*, 100 Or. App., at 746. At that juncture, state law provided the sole basis for the relief. Moreover, plaintiffs' disclaimer of any reliance on federal law was proper. Their federal substantive due process claim, based principally on pre-*Nebbia*⁸ caselaw, was so frivolous as to be insubstantial. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 160-64 (1970); see *Bell v. Hood*, 327 U.S. 678 (1946).

⁸ *Nebbia v. New York*, 291 U.S. 502 (1934). As then professor Hans Linde remarked about reliance on pre-*Nebbia* decisions:

It is not for nothing that briefs and lower court opinions adverse to a challenged regulation invariably rely on Supreme Court citations older than 1933, while the Supreme Court's own opinions invariably cite the same lengthening chain of post-*Nebbia* decisions monotonously rejecting these challenges. In part, this almost schizophrenic divergence of perception of the governing precedents in "substantive due process" litigation may no doubt be attributed to cultural lag. But in part it reflects the reluctance of state judges, and naturally of litigants, to abandon the comfortable old assumptions about judicial relief from unreasonable regulation, even when its one-time premises have shrunk into an episodic aberration of the distant past.

Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 163-64 (1970); (footnote omitted).

Plaintiffs' petition for certiorari never discusses the nature of their federal claim, nor does it ever mention the fact that they told the state trial court that their federal claim "doesn't make any difference" to the relief they were requesting.⁹ Rather, their petition takes a broader and less specific focus. They claim that after *Saylor*, "a potential right to relief under state law now means that § 1988 fees will not be available in Oregon state courts." (Pet. Cert. 19). In defendant's view, plaintiffs interpret Oregon law too broadly in at least two respects.

First, plaintiffs' reading of Oregon law rests on their assumption that "[t]he present case falls squarely within the rule of *Maher* [*v. Gagne*]," (Pet. Cert. 15). It follows, they reason, that the denial of their request for attorney fees must mean that the Oregon courts have written *Maher* off the books. The difficulty with this reasoning is that, as explained above, plaintiffs stand in quite a different position from the plaintiffs in *Maher*. One should be hesitant to assume that the Oregon courts have eviscerated *Maher*, as plaintiffs argue, when the decision in this case is virtually compelled by the combination of plaintiffs' admissions and *Smith v. Robinson's*

⁹ Nor do plaintiffs mention that they most likely never had standing to raise a federal constitutional claim in the first place. The agreement that plaintiffs claim deprived them of their water rights expressly provides:

Notwithstanding any other provision herein to the contrary, no party recognizing this agreement shall suffer any loss or reduction of water rights on account of such recognition or participation in the rotation system described herein.

(Pl. Ex. 2). If, as plaintiffs argued below, the right to accumulate water rights is a right guaranteed by the 1916 decree, then the agreement, by its own terms, expressly negates any loss of those rights otherwise created by the signing requirement. Put another way, any deficit in plaintiffs' water rights account resulting from a delay in signing could be adjusted by crediting those rights to plaintiffs. Plaintiffs therefore suffered no detriment that would give them standing.

reasoning.¹⁰ And the conflict plaintiffs perceive between this case and cases from other jurisdictions derives, in defendants' view, from plaintiffs' failure to recognize that the results of particular cases will vary depending on the relationship between the state and federal claims in each case.

The second difficulty with plaintiffs' reading of Oregon cases is that it fails to appreciate what the Oregon courts have held.¹¹ The Oregon analysis begins with *Roberts v. Mills*, 291 Or. 21, 628 P.2d 714 (1981), in which the Oregon Supreme Court anticipated the reasoning in *Smith v. Robinson*, 468 U.S. 992 (1984). The Oregon Supreme Court recognized that an award of attorney fees would be appropriate under section 1988 when fee and non-fee generating claims were combined and the court only reached the non-fee claim. *Roberts v. Mills*, 291 Or., at 24-25 n. 3. It declined, however, to exercise its discretion to award fees in *Mills* because the section 1983 claim in that case was "essentially surplusage." *Ibid*.

The Oregon Supreme Court's reasoning in *Roberts v. Mills* thus anticipated this Court's recognition in *Smith v. Robinson*, *supra*, at 1009 n. 12, that attorney fees would not be appropriate under section 1988 when the federal "claims that provide for attorney's fees ha[ve] nothing to do with a plaintiff's success." The Oregon Supreme Court followed *Roberts v. Mills*, *supra*, in *Oregon State Police Assn. v. State of Oregon*,

¹⁰ In *Smith*, the Court noted that the timing of the plaintiffs' federal constitutional claims demonstrated that they had nothing to do with the plaintiffs' success on the merits of their non-fee generating claims. 468 U.S., at 1009 n. 12. The Court explained that this fact provided an alternative basis for its holding. *Ibid*. Plaintiffs' admissions establish the same point here.

¹¹ Although the Oregon courts' interpretation is not yet developed, its general outlines can be traced.

308 Or. 531, 783 P.2d 7 (1989), *cert. den.* 111 S. Ct. 44 (1990),¹² and the Oregon Court of Appeals in turn followed *Oregon State Police Assn. v. State of Oregon*, *supra*, in this case. None of these cases purports to undo section 1988, as plaintiffs argue. Rather, they all recognize that section 1988 fees are appropriate when the federal claim played a role in the plaintiff's success on the state law claim. *See Oregon State Police Assn. v. State of Oregon*, 308 Or., at 538-39.

To the extent that the Oregon cases have suggested that this determination may take into account the existence of clearly established state law, that suggestion is not inconsistent with either this Court's holdings or the legislative history of section 1988. *Maher v. Gagne*, 448 U.S. 122 (1980), holds that section 1988 authorizes a court to award attorney fees even though the court does not reach the fee generating claim. But neither *Maher* nor the legislative history of section 1988 requires a court to award fees automatically. *Smith v. Robinson*, *supra*, at 1007-08. Rather, the legislative history states that "attorney's fees *may* be allowed even though the court declines to enter judgment for the plaintiff on [the fee-generating] claim." *Maher v. Gagne*, *supra*, at 133 n. 15 (quoting H.R. REP. NO. 94-1558, p. 4, n. 7 (1976); emphasis added); *Smith v. Robinson*, *supra*, at 1006.¹³ This discretion is broad

¹² Plaintiffs begin their petition for certiorari:

The issue presented in this petition is identical to the question raised in another case that is before this Court, *Oregon State Police Ass'n v. State of Oregon*, 308 Or. 531, 783 P.2d 7 (1989), *petition for cert. filed*, April 11, 1990. . . .

Because of the identity of the issues in the two cases, it is respectfully suggested that the immediate case should be consolidated and reviewed on certiorari together with the *Oregon State Police Ass'n* case.

(Pet. Cert. 9-10). The Court denied certiorari in the case plaintiffs claim is identical to theirs. *See* 111 S. Ct. 44 (1990).

¹³ In *Smith*, the Court explained that "Congress did not intend to have

(Footnote continued on next page)

enough to allow the state courts to accommodate each State's own practice of interpreting and reaching state law issues.

It may be that the breadth of this discretion will present a significant federal question in some future case. This case, however, does not provide a good vehicle for deciding whether the discretion manifested in the language and legislative history of section 1988 allows state courts to factor federalism concerns into the analysis of when fees should be awarded. After plaintiffs told the state trial court that their federal claims really did not make any difference to their ability to obtain a preliminary injunction, *Smith v. Robinson*, *supra*, compelled the conclusion the Oregon Court of Appeals reached.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,
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(Footnote continued from previous page)

th[e] authority [to award fees under § 1988] extinguished by the fact that the case was settled or resolved on a non-constitutional ground." 468 U.S., at 1006. To say that a court is not precluded from awarding fees does not mean that it must award them whenever it has discretion to do so. And when a section 1988 claim is raised in state court, the discretion to award fees extends beyond the state trial court's decision and includes the broader federalism concerns that may be articulated by state appellate courts.

(3)
No. 90-486

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANGL JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LOWELL SAYLOR, et al.,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE
STATE OF OREGON WATER RESOURCES
DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

PETITIONERS' REPLY BRIEF

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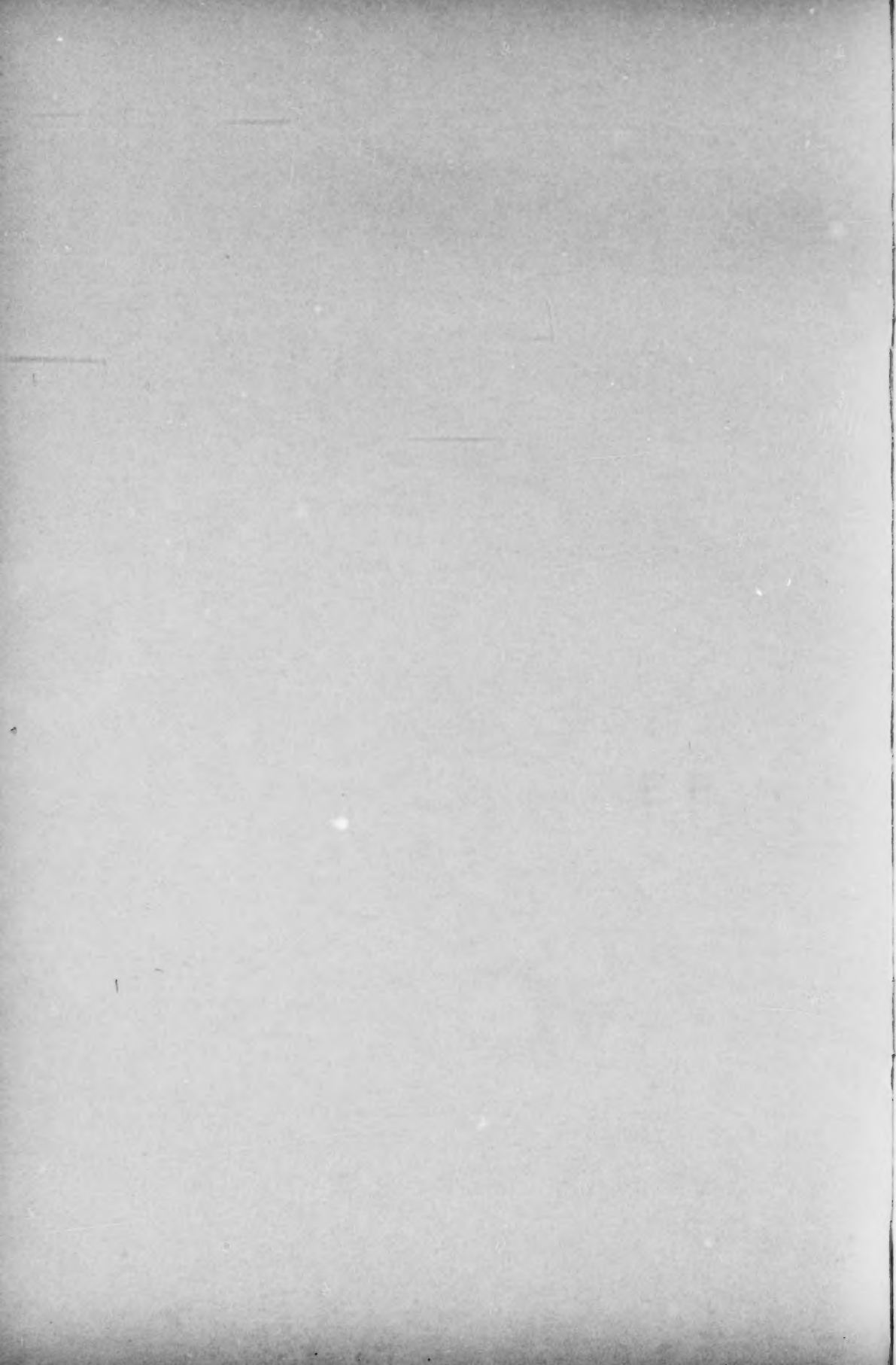


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PETITIONERS' REPLY BRIEFARGUMENT

Respondents admit that the issue posed by this case "will present a significant federal question in some future case." Respondents' Brief at 9. Yet they seek to evade review by claiming, in their question presented, that Petitioners "conceded before the state trial court that their federal constitutional claim was unnecessary to their success on their state law claim." That is both untrue and irrelevant. It is untrue because Petitioners made no such concession and, indeed, never even pleaded a state law claim. It is irrelevant because the availability of "overlapping state remedies" does not negate a federal

civil rights claim cognizable under 42 U.S.C. § 1983. Zinermon v. Burch, 108 L.Ed.2d 100, 113 (1990).

I. PETITIONERS NEVER
WAIVED THEIR FEDERAL CLAIM

Petitioners plainly alleged their federal claim in the original complaint filed on April 20, 1988. A full 23 days later, in the midst of the preliminary injunction hearing, the State filed a motion to strike the federal claim from Petitioners' complaint. Faced with this procedural ambush, Petitioners asked the trial judge to postpone considering the State's motion. According to the trial transcript, Petitioners' counsel simply argued that the State had no right to challenge the federal claim during an expedited preliminary injunction

hearing.[1] The trial judge agreed:

"This is not a hearing on the merits, it's a hearing for preliminary injunction, and other relief. Those Motions are therefore denied at this time. You can reurge them later."
(Tr. 93-94).

In deflecting the State's dilatory mo-

[1] "[A]s a preliminary matter, I think the motions to strike are premature. We can discuss those matters another day. Whether those paragraphs are in the case or not in the case, for purposes of the application for [a] preliminary [in]junction, it doesn't make any difference because what we're asking the Court to do today, Your Honor, is to enforce the decree. As far as whether . . . the State's conduct in depriving water rights is a violation of Constitutionally secured rights. That's covered in our assisting briefing in this case as well, Your Honor [I]t's in that brief that we cite the cases that stand for the proposition of water rights [as] property rights. And as property rights, water right[s] [are] not something that the State can arbitrarily [a]bridge. But again, those Motions to Strike, Your Honor, I think they are properly considered by the Court at a later time. We don't really need to talk about them today, because what we're asking for is a preliminary injunction." (Tr. 92) ("Tr." refers to the transcript of the trial below).

tion, Petitioners never disclaimed the federal constitutional claim and certainly never conceded that it was unnecessary.

The State's theory of disclaimer or abandonment conflicts with the entire record in this case. The amended complaint sought declaratory and injunctive relief based on the State's violation of Petitioners' rights under the Fifth and Fourteenth Amendments. (App. 34-36) ("App." refers to the Appendix to the Petition for Writ of Certiorari). Petitioners never pleaded a non-federal claim.

Fully cognizant of the pleadings, the State's trial counsel never asserted a disclaimer in the trial court and never renewed the motion to strike the federal claim, even though the trial judge ex-

pressly permitted the State to do so. (Tr. 94). Both points indicate the continued presence and substantiality of Petitioners' federal claim in this case.

Furthermore, in awarding Petitioners attorney fees under 42 U.S.C. § 1988, the trial court held that Petitioners were entitled to relief on their federal claim under § 1983. (App. 15-17). If Petitioners "conceded" or "disclaimed" their federal claim before the trial court, why would the very judge who conducted the preliminary injunction hearing later award relief on Petitioners' federal claim?

II. THE STATE DID VIOLATE PETITIONERS' FEDERAL RIGHTS

Respondents present the substantive component of constitutional due process

as an archaic concept. In fact, just a few months ago, this Court reaffirmed that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon v. Burch, 108 L.Ed.2d 100, 113 (1990).

The trial judge found that a substantive due process violation is precisely what occurred in this case. When Petitioners called upon the State to deliver Petitioners' vested entitlement of irrigation water, the State responded that it would perform only if Petitioners signed a written plan modifying their Water Rights Decree and forfeiting water rights already accumulated under the terms of the Decree. (App. 16-17). Petitioners refused to submit to this state-mandated

forfeiture. Faced with an impending drought, they filed this action in state court seeking a declaratory judgment that the State's action was a taking of Petitioners' property rights without just compensation and a denial of substantive due process under the Fourteenth Amendment. (App. 34-36). Petitioners sought redress of these rights pursuant to 42 U.S.C. § 1983 and requested attorney fees under 42 U.S.C. § 1988. (App. 36-37). Petitioners also sought an injunction ordering the State to restore Petitioners' irrigation water. (App. 37). Again, Petitioners presented no non-federal claims!

The trial court issued the requested injunction, holding that the State's plan "has the effect of a unilateral modification of the 1916 decree" with "no basis

for validity within the decree"

(App. 18). Petitioners then moved for attorney fees under 42 U.S.C. § 1988. Once again, Petitioners prevailed. According to the trial court's findings:

"the Watermaster's plan was an unauthorized deprivation of plaintiff's water rights. Those rights were property interests, thus plaintiffs were denied substantive due process under the U.S. Constitution."

(App. 17 (emphasis in original)).

It cannot be questioned that 42 U.S.C. § 1983 affords a remedy for this arbitrary action under color of state law. That is the essence of the trial court ruling.^[2] Nor can it be questioned that, having obtained an injunc-

[2] Even the opinion of the Oregon Court of Appeals recognized that decreed water rights are vested property interests entitled to judicial protection. (App. 9).

tion affording complete restitution of their property rights, Petitioners are "prevailing parties" entitled to recover their attorney fees from the State pursuant to 42 U.S.C. § 1988.

Respondents' suggestion that Petitioners' federal constitutional claim was subsumed in a parallel state law remedy turns federalism on its head. In effect, Respondents contend that victims of plainly unconstitutional action performed under color of state law must bear their own litigation costs whenever a post-deprivation procedural vehicle for challenging the unconstitutional action exists under state law. That is absurd: such a rule grants the states license to violate the constitutional rights of all those who cannot afford to retain legal counsel to secure legal

redress. Congress enacted § 1988 precisely to prevent such a result. Riverside v. Rivera, 477 U.S. 561, 576 (1986).

CONCLUSION

The case presents a central issue in the litigation of federal constitutional rights. The record presents the issue clearly, without material factual dispute, and without procedural complication. The Oregon Court of Appeals denied Petitioners' federal rights and ignored federal law. A writ of certiorari should be granted and the case remanded to reinstate the trial court's attorney fee award and for an award of attorney fees on appeal.

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